IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 252

JOHN D. McNABB, *Petitioner,*

vs.

KATHERINE T. SLATER.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR KATHERINE T. SLATER IN OPPOSITION

Opinions Below

The opinion of the District Court for the District of Columbia is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit was rendered May 3, 1951, No 10761.

Questions Presented

1. Was the finding of the United States Court of Appeals for the District of Columbia Circuit that petitioner McNabb relied solely upon his own investigation erroneous?

2. Did the United States Court of Appeals for the District of Columbia Circuit commit error when it held that an expression of opinion as to the value of property is ordinarily held not to be actionable because it is not a statement of fact?

3. Did the United States Court of Appeals for the District of Columbia Circuit commit error when it held that there was only one representation about which there was no real conflict in the records and which did not depend upon evaluations of credibility: the representation as to value of the peach orchard?

Counter Statement of Matters Involved

This counter statement is deemed necessary because respondent believes petitioner's Statement of Matters Involved is inadequate and inaccurate.

In May 1948, O. E. Thomas, now deceased, father of respondent, came to Washington, D. C., from Tennessee and met Robert E. Cox, who was then a partner in Senate Realty Company. At this time Thomas had property which he was desirous of selling or trading and discussed this with Mr. Cox, who indicated that he might be able to work out something for Thomas. In June 1948 it was proposed that certain real estate located in the District of Columbia, managed by Senate Realty Company, be exchanged for the property in Tennessee which Mr. Thomas had previously indicated to Mr. Cox he wished to sell. Cox thereupon arranged a meeting in Washington between Thomas and Petitioner McNabb, who was then the owner of the Washington property. Thomas at no time represented to anyone that he actually owned the orchard in Tennessee but represented to Senate Realty Company that he merely had the orchard and would deliver title to it. Thomas represented to no one that he had operated this particular orchard but rather that he had owned one or two other orchards. He represented and believed that the orchard contained 139½ acres, and that the orchard con-

tained 11,000 or more peach trees. He first offered this orchard for sale for $55,000 but later reduced the price to $37,500. He estimated to appellant that the 1948 crop would produce 10,000 bushels but at the time of petitioner's first visit to the orchard he reduced his estimate to 5,000 due to intervening climatic conditions. At no time during the Washington negotiations or the negotiations between Thomas and petitioner did Thomas hold himself out to be G. L. Cleckler, who was the owner of the Tennessee orchard, but at all times represented himself to be O. E. Thomas who had an orchard to sell and to which he could deliver a good title.

During the meeting in Washington with petitioner, referred to hereinbefore, Thomas made representations to petitioner as outlined above and represented further that the foreman of the orchard was paid $3.00 per day when working.

Petitioner went to Tennessee in June 1948 to inspect the orchard. During this inspection, he saw 9/10 of the orchard from the top of a hill and at close range inspected ¼ of it. Petitioner himself testified that on this occasion he had ample time and opportunity to walk over any part of this orchard and examine it and he noticed at this time that many trees bore practically no peaches or very few. Thomas advised him that the entire orchard was similar to the portion seen except for one section the cold weather had hit the previous winter.

Thomas and petitioner then went to the town of Evansville and had a conversation with one S. Harrison, who indicated to petitioner that he had acted as broker for the original owner quite a number of years ago and, in petitioner's own words, "* * * that he had sold some of the products for Mr. Cleckler, who was the owner * * *." At that time petitioner requested Harrison "* * * to look at the orchard and give me an idea of it." At a later date petitioner requested Harrison to go to the orchard and inspect it and make a report to him, which Harrison did.

Then petitioner contacted E. L. Tipps, the county agriculture agent in Rhea County, adjoining Hamilton County, the situs of the orchard, and requested Tipps to inspect the orchard and submit a report, in writing, which he did. Thomas testified that petitioner McNabb advised him, prior to the consummation of the agreement, that he was waiting for information from Harrison and Tipps before he could decide what to do.

Thomas, in the exchange agreement of July 12, 1948, agreed to convey his right, title and interest in the orchard. He carried out this promise July 16, 1948. Subsequent to July 12, 1948, petitioner McNabb again went to Tennessee and visited the orchard July 15, 1948. On July 16, 1948, the date on which petitioner McNabb received title to the orchard, as previously indicated, he knew that G. L. Cleckler was the owner of the orchard.

According to petitioner's own testimony in the District Court, on the occasion of petitioner McNabb's *first* visit to the orchard in June, he inquired of Henekar Parker, witness in behalf of petitioner and former manager of the orchard, as to the nature of Parker's employment and compensation.

Petitioner started picking peaches the 17th of July, 1948 and continued picking peaches on the 18th, 19th and 20th of July, 1948. On the 20th of July, McNabb acknowledged his deed transferring the Washington property to Thomas' daughter, respondent Slater. Having executed the contract on July 20, McNabb continued picking peaches, with Parker acting in the capacity of foreman, until July 23, 1948. McNabb testified that his purpose in doing this was to see whether he had 5,000 bushels. He did not take steps to rescind the exchange agreement until after he finished picking peaches on July 23, 1948.

McNabb filed a complaint in the District Court of the United States for the District of Columbia August 9, 1948, naming as defendants O. E. Thomas, Lilah R. Thomas and Katherine T. Slater. O. E. Thomas and Lilah R. Thomas,

husband and wife, were not served with process as required by law and neither has entered an appearance in this case, although respondent Slater, who was properly served, entered the deposition testimony of O. E. Thomas, her father, in order to refute the allegations contained in the complaint, which if unchallenged would have deprived her of her property. The issues before the Court at that time were, whether the alleged representation of Thomas as outlined in paragraph 8 of the complaint were made as statements of fact which were untrue and known to be untrue by Thomas, or else recklessly made, were made with the intent to deceive and for the purpose of inducing the plaintiff to act upon them and whether plaintiff did in fact rely on them and was induced thereby to act to his injury or damage.

After hearing the evidence the Court entered a final judgment, based upon the entire record, dismissing McNabb's complaint with costs. Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the United States District Court.

Argument

Petitioner McNabb did not enter into the exchange agreement as the immediate result of the alleged misrepresentations by Thomas. According to the oral testimony of petitioner in open court, before consummating the exchange agreement he visited the orchard twice, contacted a fruit broker in the area who was familiar with the property and asked a county farm agent to report to him on the condition of the orchard. Upon consideration of this testimony the trial court held and the Court of Appeals affirmed the holding, that petitioner McNabb relied solely upon the information gathered by independent investigation as to the condition and value of the orchard. It is well settled that the trial judge is best able to estimate the credibility of the witnesses testifying with regard to the issues raised

and the Court of Appeals held that "Wo do not find his conclusions on these points 'clearly erroneous.' "

Petitioner contends that this decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with a decision of this Court, namely, *Stewart* v. *Wyoming Cattle Ranch Co.,* 128 U. S. 383, three decisions of courts of coordinate jurisdiction, namely, *Tooker et al* v. *Alston,* 159 F. 599; *Sioux National Bank* v. *Norfolk State Bank,* 56 F. 139; and *Brach* v. *Moen,* 35 F. (2d) 475, three of its own decisions, namely, *Slater* v. *Ruggles,* 49 App. D. C., 277; *Owen* v. *Schwartz,* 85 U. S. App. D. C. 302, 177 F. (2d) 641; and *F. H. Smith Company* v. *Low,* 57 App. D. C. 167, and has not given proper effect to decisions of this Court, namely, *Graffam* v. *Burgess,* 117 U. S. 180; and *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 766.

Respondent admits that in all of the above-cited cases, there exists definite conflict with the case at bar, however, the conflict is to be found in the facts rather than the legal principles concerned. It is well settled that fraud is present upon showing that the representations were made as statements of fact, which were untrue and known to be untrue by the party making them, or else recklessly made; that they were made with the intent to deceive and for the purpose of inducing the other party to act upon them; and that he did in fact rely on them and was induced thereby to act to his injury or damage. In the above-cited cases the courts held that the factual situations presented by the evidence warranted a finding of the existence of fraud. But in the case at bar, the elements constituting fraud were found not to be present both by the District Court and the Court of Appeals.

In *Stewart* v. *Wyoming Cattle Ranch Co., supra,* the fact to be ascertained was the number of calves. The ranch was so large that it would have been physically impossible for the investigator to have determined the number. He therefore was forced to rely on the information furnished

by the vendor. In the case at bar, McNabb could have easily obtained information as to the number of trees, number of acres, condition of the trees, etc., if he had attached any importance to these things as factors inducing him to enter into the echange agreement. In fact, Tipps, the county agriculture agent, who was hired by McNabb to report on the condition of the orchard, furnished McNabb, prior to the consummation of the exchange agreement, data concerning the number of trees, the number of bushels of peaches that would be harvested in 1948, the demand for peaches in the area, the fact that the peach crop was killed by a late frost in the Spring of 1948, and advice that the orchard would repay the owner in production within a short time, if some improvements were made on it. There was no evidence offered to show that Tipps was prevented in any way from making as full an investigation as he deemed necessary. Surely all of these things comprised components sufficient to have enabled McNabb to decide whether the orchard constituted a fair exchange for the Washington property. It is therefore apparent that in *Stewart* v. *Wyoming Cattle Ranch Co., supra,* the court held that there had been reliance because the knowledge necessary to obtain truth or falsity of the representations made was not readily accessible to the vendee. In the case at bar the trial court and the Court of Appeals held that there was no reliance because of the extent and nature of the independent investigation by McNabb.

In *Tooker et al* v. *Alston, supra,* the court found that there was active misrepresentation as to the physical condition of the mine in that the vendor represented that the mine was on solid ground when in fact the vendor knew that the floor of the mine for sale had broken through the roof of a worked-out mine below. Further, the court held that the vendor thwarted any investigation and inquiry by the vendee. In the case at bar the Court of Appeals held that not only did McNabb undertake an independent investigation of the property but also it did not appear

that Thomas had done anything to hinder the investigation in any way, and in addition held that the record contained ample evidence in support of the general finding of the trial court that there was no misrepresentation practiced upon McNabb.

Petitioner cites *Sioux National Bank* v. *Norfolk State Bank, supra,* to illustrate the rule of law that there does not exist a presumption of reliance upon information gained by investigation and consultation with others by a mere showing that an investigation was made. In the case at bar the Court of Appeals did not mention any such presumption but rather held that the record contained ample evidence in support of the trial court's finding that McNabb had in fact relied solely upon his own investigation as indicated by his subsequent course of action. Also, the Court of Appeals found that the representations made by Thomas were not material inducements to the transaction in question and affirmed the decision of the trial court that the independent investigation by McNabb was the sole material inducement.

In the case of *Brach* v. *Moen, supra,* the question for determination was whether there was knowledge on the part of appellants of the fraud practiced, not whether there was fraud. The Court said "That Moen was defrauded out of his farms by Stewart cannot well be questioned * * * he was as completely lost as a babe in the woods." In the case at bar the question of respondent's knowledge has never been raised. The question in the instant case is whether petitioner proved in the trial court the existence of fraud.

In *Slater* v. *Ruggles, supra,* cited by petitioner in an attempt to establish that the parties did not stand on an equality, petitioner fails to recite that McNabb was found by the Court of Appeals to be more than ordinarily capable of appraising the components of value in that he was an educated man who had had some experience with real estate to the extent of having been licensed as a real estate salesman in the District of Columbia.

In the case of *Owen* v. *Schwartz, supra,* the representations were made with regard to the existence of a $30,000.00 loan commitment, which is obviously a statement as to a material and existing fact, and acreage which an examination of the plat would not have disclosed. In the case at bar the representation as to value of the orchard was held by the Court of Appeals to be an expression of opinoin rather than a statement of fact. The loan commitment is in the class of things the value and existence of which are ascertainable. Value of property such as a peach orchard depends so much upon unpredictable factors that it falls within the area of speculative investments. As to the acreage of the peach orchard, the evidence unquestionably showed that McNabb was advised by the recitations contained in the deed that there were only 120 acres more or less.

In *F. H. Smith Company* v. *Low, supra,* the representation as to the value of land fell within one of the accepted exceptions to the general rule that representations as to value of such things as land are not actionable, in that they constitute mere expressions of opinion. In that case the representation was made to be treated as an immediate factor inducing action instead of a mere element to be investigated before action. There was present a threat to increase the price if not accepted at once, whereas in the instant case the evidence unquestionably indicated that the price of the peach orchard was steadily decreasing during the negotiations.

In *Graffam* v. *Burgess, supra,* which involved a judicial sale of a house evaluated at $10.000.00, plus furnishings, for a judgment of $28.95, the value of the house and the amount of the bill owed to Burgess were never in question, and the disparity was so great that it shocked the conscience of the court. In the instant case, petitioner offered as proof of the value of the District property his own testimony as to the amount he paid for it. Using this as a criterion it is noted that petitioner paid $37,500.00 for the peach orchard, thus establishing its value at that price.

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Petitioner contends that the decision of the United States Court of Appeals for the District of Columbia Circuit in the instant case has not given proper effect to the decision of this Court in *United States* v. *U. S. Gypsum Co., supra.* The Court of Appeals said "The issues of fact thus raised could be resolved only by estimates of credibility, estimates which could best be made by the trial judge, who was the trier of fact below. We do not find his conclusions on these points 'clearly erroneous.'" It is obvious that the Court of Appeals understood and followed the legal principles laid down by this Court in *United States* v. *U. S. Gypsum Co., supra.*

Conclusion

Respondent submits that the evidence adduced at the trial below did not show the existence of the elements of fraud. There was no clear and convincing proof. Much of the evidence was uncorroborated oral testimony, even in connection with facts of which records were allegedly kept. The record fails to disclose that the trial court's findings of fact were wrong. There is substantial evidence regarding the existence of facts which the lower court held were existent, and where the court failed to make a definite finding it was because there was not a sufficiency of evidence or because, after observing the demeanor of the witness in open court, the trial judge doubted the veracity of the witness.

The decision of the court below is plainly correct and there are no conflicts of decision or improper application of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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